IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1480~~
(Now No. 70-98)

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

RUDOLPH SANTOBELLO,
Petitioner.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.
Petition for Certiorari Filed March 18, 1971
Certiorari Granted May 29, 1971

RESPONDENT'S BRIEF

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent
851 Grand Concourse
Bronx, New York 10451
(212) 588-9500

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

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RESPONDENT'S BRIEF

Question Presented

On the totality of circumstances was the petitioner's constitutional right to due process of law abridged by the prosecution's failure literally to comply with its promise to refrain from asking for imposition of a prison term at the time of sentence?

Statement of the Case

On November 13, 1968, the petitioner, Rudolph Santobello, was arrested by a Patrolman Serpico for the alleged possession in Bronx County on that day of 840 "plays" (*i.e.*, bets) of what is termed "mutuel race horse policy" and of certain "controller's" records of gambling transactions (14a).* On November 13, 1968, a grand jury indicted the petitioner for the felonies of Promoting Gambling in the First Degree [N. Y. Penal Law, §225.10] and Possession of Gambling Records in the First Degree [*id.*, §225.20]. A plea of not guilty was entered by petitioner Santobello on January 27, 1969, in the Supreme Court of the State of New York, County of Bronx.

By motion returnable on June 17, 1969, supported by the affidavit of the petitioner herein sworn to April 19, 1969, the defense moved to suppress tangible evidence and oral statements obtained from an allegedly unconstitutional search and seizure (43a-6a).

Prior to the return date of the motion mentioned in the preceding paragraph, and more specifically on June 16, 1969, Santobello entered a plea of guilty before Justice Charles Marks to the crime of Possession of Gambling Records in the Second Degree, a Class A misdemeanor punishable by a maximum term of one year in prison (18a-20a). At that proceeding the petitioner was represented by an attorney named Max Fruchtman and the prosecution was represented by Assistant District Attorney David Greenfield (who has since resigned), but the record also indicates that the then Executive (now Chief) Assistant District Attorney Seymour Rotker was "standing by"

* Unless otherwise noted, references are to pages of the consecutively numbered Appendix and Supplemental Appendix filed in this Court by the petitioner and the respondent, respectively.

(18a). The application to change the plea was voiced by Mr. Fruchtman and Assistant District Attorney Greenfield, who thereafter recommended that the Court accept the plea, pointing out that the facts of the case were that the petitioner had possessed more than 500 policy bets at the time and place already mentioned (18a-9a). Whereupon, Justice Marks elicited from Santobello an acknowledgment that the facts as set out by the prosecutor were true and correct, and that the petitioner was pleading guilty of his own free will (19a-20a). Thereafter, the presiding jurist set June 30th for sentence, and he ordered that a probation report be prepared in the interim (20a).

On June 17th, the Executive Assistant District Attorney appeared before Justice Marks and requested that, because of the absence of defense counsel, the pending motion to suppress be put over until the date of sentence so that the defense could withdraw it at that time as moot (53a-4a). On June 30, 1969, Mr. Fruchtman did withdraw the suppression motion, but Justice Marks declined to impose sentence on that day because he did not have the necessary "papers" (55a-6a). While the justice stated (56a) that the adjournment would be until "Wednesday," our search of the records disclosed no further proceedings until September, 1969.

On the 16th of that month, the case was on before Justice Marks, who advised Mr. Fruchtman, without any recorded preliminaries, that the matter was being adjourned for one week "[i]n view of the Probation Report * * *" (57a-8a).

On September 23rd, Mr. Fruchtman was replaced as defense counsel by Joseph Aronstein, Esq., who stated that he had prepared two motions and that he contemplated

making a third (59a-60a). Mr. Aronstein went on to assert that he had left the return date on the motions blank because, in essence, he did not know when Justice Marks would be sitting in the Bronx again (60a). Incidentally, in that connection, it may be observed that the First Judicial District in New York State consists of New York and Bronx Counties and—for informational purposes although dehors the record—that Justice Marks was assigned only occasionally to the Bronx and present therein during much of the time now relevant because he was conducting a post-conviction hearing pursuant to an order of an appellate court. In any event, Justice Marks informed Mr. Aronstein on the occasion under discussion that motions should be noticed for October 8, 1969 (61a).

In all, three motions were returnable on that date. One was a motion to withdraw the plea of guilty (5a-10a) and, in his supporting affidavit, the petitioner Santobello averred, *inter alia,* "* * * that before and at the time a plea of guilty was entered deponent did not know that he had the right to move to suppress any evidence secured by the police as aforesaid" (7a). In his affirmation in opposition to that motion, Executive Assistant District Attorney Rotker asserted that the movant had not set forth any reason warranting the relief prayed for, and he went on to request that, in the event that the Court were not disposed to deny the motion outright, a hearing be held to determine the factual issues (15a-6a).

The second motion returnable on October 8th was one to suppress any evidence secured by the prosecution as a consequence of an allegedly illegal search in violation of the petitioner's Fourth and Fifth Amendment rights, and Santobello, in his supporting affidavit, asserted that no

previous application had been made for the relief prayed (11a-3a). The third motion noticed for October 8th was one to inspect the grand jury minutes or, in the alternative, to dismiss the indictment (48a-52a).

On October 8th, Messrs. Rotker and Greenfield were present in the courtroom in which Justice Marks was presiding (63a-6a). Mr. Rotker requested that a hearing be held on the motion to withdraw the plea of guilty, announcing his intention to call the first defense attorney, Mr. Fruchtman, as a witness on the factual issues raised by the petitioner's affidavit, including the assertion therein that "* * * he was unaware of certain constitutional rights * * *" (*ibid.*). Whereupon, the Court set October 23rd for a hearing, the adjourned date already agreed on for the two other motions (*ibid.*).

On the adjourned date, Justice Marks stated that he saw no need for a hearing, and he again adjourned the case until October 29th, upon which day there was a further postponement because the prosecution's brief had not been received by the Court (67a-71a).

On November 26, 1969, Justice Marks denied the petitioner's motion to withdraw the plea of guilty, ordering defense counsel to submit an appropriate order, and that jurist also fixed a date for sentence, January 9, 1970—a date which, incidentally, proved to be subsequent to his own retirement from the bench (72a-3a). No appearance by a prosecutor on that day (*i.e.*, November 26th) is reflected by the record, and the Court's decision on the motion was never recorded in its motion book (76a-7a). The original moving papers, including petitioner's affidavit wherein he swore that he had been unaware of the right to make a suppression motion albeit he had already made one in this

case, are missing from the files of the Supreme Court, Bronx County (*ibid.*). The Clerk of Bronx County has certified to this tribunal his inability to locate those documents after several searches, one of which was carried out at the behest of the Bronx District Attorney's Office in January, 1970 (76a-7a).

The other two motions originally returnable on October 8th were "marked off" the calendar by Justice David Ross, on December 15, 1969, at the behest of Assistant District Attorney Greenfield, who remarked, in substance, that the motions were academic until such time as Justice Marks decided petitioner's motion to withdraw his plea of guilty (74a-5a).

Sentence was imposed upon the petitioner by Justice Abraham J. Gellinoff on January 9, 1970 (21a-37a). At that time, defense attorney Aronstein stated the following:

> "Now it is true, I made a motion before Judge Marks to withdraw the plea, and that motion was denied. No order has been entered, as far as I know, and I don't really recall whether the Court at that time in denying the motion, stated that this was the decision and order of the Court. I don't recall whether he said that. However, I've never been served with any copy of any order, or decision, with notice of entry" (24a).

Next, the defense lawyer referred to his motions to suppress and for inspection of the grand jury minutes in connection with an unsuccessful request for another adjournment (24a-6a). As for the suppression motion, Justice Gellinoff pointed out that an earlier motion for the same relief had been pending at the time the petitioner had pleaded guilty, and he added that the taking of the plea had rendered all the motions academic (26a-8a).

Thereafter, Executive Assistant District Attorney Rotker recommended a maximum sentence on the basis of the petitioner's criminal record—including his 1951 conviction and life sentence for the murder of a police officer; his criminal activities after his release on parole; his alleged extensive links with organized crime; and his apparent wealth, the source of which was not apparent (32a-4a). Counsel for the defense then stated the following:

> "Mr. Aronstein: Mr. Fruchtman, the lawyer who was present, and was this defendant's attorney, at the time of the plea, told me, and told me that he will testify under oath, that at the time he took the plea, Mr. Greenfield, the Assistant District Attorney told him that the District Attorney will not make any recommendations, with respect to the sentence. And I therefore, ask that at this time this Court adjourn this sentence for a short period of time. I'll produce Mr. Fruchtman, and—in court, and have him testify in open court, as to what—
>
> "Now if what Mr. Fruchtman says is true, then the plea was obtained by fraud and deception, by the District Attorney, if it was obtained on the expressed promise that the District Attorney would make no recommendation" (34a).

At that juncture, Mr. Rotker remarked, in essence, that there was no proof of such an occurrence (34a). There followed a brief interlocution between opposing counsel about the absence from the plea minutes of any indication of a sentence promise, which discussion was terminated by the judge (34a-5a).

Next, Justice Gellinoff remarked that there was no need to adjourn the sentence or have any testimony because he

would not be influenced by what the District Attorney said (35a). The presiding jurist then quoted from the defendant's probation report as follows:

> " 'He is unamenable to supervision in the community. He is a professional criminal * * * and a recidivist. Institutionalization * * * is the only means of halting his anti-social activities' " (35a-6a).

The one-year maximum sentence was then imposed (36a).

On January 15, 1970, the petitioner obtained a certificate of reasonable doubt and was admitted to bail (38a-9a). Santobello's claim that he had been promised taciturnity on the prosecution's part at the time of sentence by Mr. Greenfield was conceded to be accurate by the prosecution in the State appellate courts, wherein the propriety of Justice Gellinoff's action *vis-a-vis* petitioner's due process rights was argued. The conviction was unanimously affirmed by the Supreme Court of the State of New York, Appellate Division, First Department [35 A. D. 2d 1084 (40a-1a)], and leave to appeal to the New York Court of Appeals was denied by Burke, J., on February 4, 1971 (41a-2a). On February 16, 1971, Mr. Justice Harlan granted bail to the petitioner pending the disposition of the instant petition. Petitioner did not thereafter move to amend the remittitur so that it would be clear that the New York Courts had passed upon a federal question. As to that, the parties herein have treated the case as one which could not be resolved in the State courts on procedural grounds or upon an independent state ground, and, as has been indicated, arguments in the briefs and orally in the Appellate Division addressed themselves to a claimed deprivation of Santobello's due process rights.

Summary of Argument

As petitioner would have it, this is a rather simple case where his right to relief is clear-cut. Thus, he concludes, this Court should vacate his conviction because the prosecution failed literally to comply with a promise to remain silent at the time of sentence, urging instead that he be given the maximum term which the judge thereafter did impose. Analysis of the record, however, will disclose that a viable "sentence agreement" never existed, for the petitioner simply was not induced to plead guilty because of the pertinent prosecutorial representation. Even if such a viable compact is assumed to have existed, the record would further establish that the petitioner received the functional equivalent of his bargain because the possible breach was called to the attention of the sentencing judge in a timely fashion. Utilization of the "functional equivalency approach" to redress defendants for such wrongs is fully approbated by the cases, the usual forms of relief being the granting of permission to withdraw the plea of guilty or the modifying of the sentence to conform with the terms of the agreement. Here, for cogent and persuasive reasons, the sentencing judge imposed a sentence thought appropriate by him, viewing the courses of action just mentioned as inapt. In so doing, that jurist did not violate the declarations of this Court, or any other persuasive and binding authority, concerning the standards of conduct and of fairness required of prosecutors or concerning a defendant's due process rights attendant upon his entering of a guilty plea.

Argument

Prefatorily, we wish to observe that the question involved herein is hardly as shallow as petitioner would have it, by urging, in essence, that a broken sentence promise requires that the defendant be returned to the *status quo ante* in every case. The opinions of this Court as least insofar as we have been able to discover, have not gone that far or even dealt with a factual context truly analogous to the instant situation. Needless to say, there can be no legal or moral quarrel with this tribunal's oft-declared insistence upon adherence to due process norms in connection with the whole process of accepting a plea from a defendant in a criminal case. The concession in the appellate courts of New York State—that a promise to remain taciturn at the time of sentence was made to the petitioner by an assistant district attorney—reflects an effort to meet the prosecutorial obligation of fairness. Consistently, a belief that there exists a *per se* rule vitiating, without regard to any other attendant circumstances, pleas taken in violation of a prosecutorial promise would have impelled the respondent to refrain from arguing in the State courts that the petitioner's conviction could be upheld without doing violence to contemporary notions of due process—a contention approbated by those tribunals. In our opinion, the State determination herein is not undermined by any persuasive precedent in our nation. True, the record is somewhat sparce, in the absence of an evidentiary hearing, for demonstrating such things as what reliance the petitioner actually placed on the promise. Yet, we believe that the record is sufficient to obviate the need

to remit the matter for an evidentiary hearing, particularly since there is no dispute as to the making of the promise. For our part, we now intend to argue on the basis of the petitioner's own actions as disclosed by the record. Additionally, an inference will be drawn to the effect that Santobello must have appreciated that, in view of his criminal record, he could hardly have escaped incarceration under any circumstances. While the record contains ample justification for that inference, the probation report will, we believe, leave no doubt. Hence, we have requested this Court, by formal motion, to consider that document.

Having made our preliminary observations, we turn now to a demonstration that there was no viable "sentence agreement" here and that, even assuming that there had been such a pact, it may be viewed as having been substantially honored, making the breach of agreement moot.

To begin with, the record may fairly be said to depict the petitioner Santobello as a courtroom-wise recidivist with a single purpose in this litigation, to wit, to avoid serving any time in prison. Sundry factors prompt the characterization aforesaid.

For example, the record indicates that, prior to this case, the petitioner was convicted of murder, and that the probation department, as the sentencing judge stated, found him "* * * unamenable to supervision in the community," and to be a "professional criminal," with the result that institutionaliation was recommended (35a-6a). While we have no knowledge respecting the balance of the probation report, so strong a recommendation suggests that Santobello must have known, before pleading,

that he had little, if any, chance of avoiding incarceration in the event of a conviction herein and that the granting of permission to plead guilty to a lesser charge was a substantial benefit to him.

Relevant, moreover, is the consideration that the petitioner did not claim innocence at the time of the proceedings at the trial court stage, a circumstance he seeks to preclude consideration of at this time by a belated assertion that he is not "legally guilty" (brief, p. 13). Indeed, no claim of innocence has been voiced by the petitioner, himself, at any stage of the proceedings, even in his efforts to withdraw the plea of guilty. Had Santobello advanced such a contention, his utterance alone seemingly would have required the presiding justice either to permit withdrawal of the plea or to conduct a hearing as to the merits of the pertinent claim [see *People* v. *McKennion*, 27 N.Y. 2d 671, 261 N.E. 2d 910 (1970)], albeit the *McKennion* rule was modified by the New York Court of Appeals after *certiorari* was granted herein [see *People* v. *Dixon*, 29 N.Y. 2d 55, —— N.E. 2d —— (1971)]. Incidentally in that regard, New York statutory law, both at the time now relevant [Code Crim. Proc., §337] and today [Crim. Proc. Law, §220.60, subd. 4] authorized the withdrawal of guilty pleas prior to the imposition of sentence as a matter of judicial discretion, and denials of requests to withdraw such pleas have traditionally been treated by the State appellate courts in terms of whether or not there had been abuses of such discretion [see, *e.g.*, *People* v. *Dixon*, *supra*].

Thus far, then, we have seen that a basis exists reasonably to infer that, when negotiating for a plea in this case, the petitioner Santobello knew that his chances of staying

out of prison were slim and "* * * that judges, not prosecutors, control sentences" [*Machibroda v. United States*, dissenting opinion, Clark, J., 368 U.S. 487, 499, 82 S.Ct. 510, 516 (1962)]. While the petitioner succeeded in obtaining a promise from one assistant district attorney that the prosecution would remain silent at his sentencing rather than ask for the imposition of a jail term, certain of his affirmative actions, as distinguished from his failure to claim innocence, virtually impel the conclusion that the said petitioner placed no reliance upon the efficacy of the relevant representation as a mechanism insuring avoidance of incarceration—the sole objective of Santobello.

Illustrative is the timing of his guilty plea and the first motion to suppress evidence on the ground that evidence was illegally seized from him. Interestingly, that motion was made returnable when Justice Marks happened to be in the Bronx County motion part some two months after Santobello's supporting affidavit had been executed, and the defense withdrew that motion in open court before Justice Marks at a point in time following that jurist's acceptance of a plea of guilty from the petitioner (43a-7a, 53a-6a). Thus, it seems to be an inescapable conclusion that the petitioner Santobello opted to plead before the justice he viewed as most likely to be sympathetic to his efforts to avoid imprisonment, gambling on that evaluation to the extent of abandoning his claim of deprivation of constitutional rights. Indeed, he pressed for immediate imposition of sentence following abandonment of the suppression motion, but the jurist in question could not proceed at that time because he did not have the necessary "papers" (56a).

Furthermore, on the next occasion when proceedings were had herein, Justice Marks, on his own initiative from what appears, granted the petitioner a one-week adjournment "[i]n view of the Probation Report * * *" (58a). Thus, Santobello was forewarned that his history of conflict with the law and other relevant considerations precluded sentence being suspended even by a jurist he had thought likely to be sympathetic towards him. Faced with that possibility, however, the petitioner did not rely upon the prosecutorial assurance of taciturnity at the time of sentence as being potentially effective to achieve what he viewed as the *summum bonum*. Instead, he sought, before Justice Marks, on the adjourned date, to withdraw his plea of guilty and to litigate certain legal questions pertaining to his indictment (59a-62a).

The motion to withdraw the plea (5a-10a) is noteworthy respecting the petitioner's state of mind for several reasons. For one thing, there was no reference in Santobello's supporting affidavit to the prosecution's posture on the sentencing question despite the presaged view of Justice Marks. Moreover, that affidavit, which has been missing from the files of the Bronx County Supreme Court at least since January, 1970, may be viewed as being *prima facie* perjurious because of the petitioner's assertion therein that he had not known about his right to move to suppress evidence prior to taking the plea, when the fact was that he had earlier sought such relief by means of a motion supported by his own affidavit sworn to some two months prior to entry of the guilty plea. Such was the extent to which the petitioner was apparently willing to go in order to escape confinement. Indeed, if it had not been for Justice Marks' ruling that the hearing requested by the prosecu-

tion in connection with the motion under discussion was not necessary, it is conceivable that petitioner might have been indicted for perjury— a statement further assuming that the original affidavit filed in the pertinent court would have been available as evidence.

Additionally, one of the two motions which Santobello wished to be considered in the event that his application to withdraw the guilty plea was granted also sheds light on the petitioner's mental processes. We refer to the second motion to suppress evidence (11a-3a) which is substantially identical with the first motion for the same relief abandoned by Santobello (43a-7a). That is to say, the good faith of the latter application is questionable under the circumstances, and reiteration of that contention may properly be labelled as a further delaying tactic. Incidentally, the later suppression application was "marked off" the calendar due to an assistant district attorney's assumption that no determination could be had thereon until Justice Marks had ruled upon the motion to withdraw the guilty plea, (74a-5a)—a ruling already rendered unknown to the prosecutor, conceivably because defense counsel had failed to file an appropriate order as directed by Justice Marks (compare 73a with 24a). Also that defense attorney sought unsuccessfully to revive the second suppression motion at sentence by voicing a misplaced reliance upon an opinion by this tribunal [cf. *Kaufman* v. *United States,* 394 U.S. 217, 89 S.Ct. 1068 (1968)], but the determination thereon was not challenged in the State appellate courts, nor in any complaint now levelled. Similarly, the ruling on the remaining motion (*i.e.,* to inspect the grand jury minutes or, in the alternative, to dismiss the indictment) was not challenged thereafter.

When the petitioner appeared before Justice Gellinoff for sentence, there was no pending motion to withdraw the guilty plea, albeit defense counsel seemed to be somewhat confused on that subject while bending every effort to postpone the sentence (24a). Be that as it may, the presiding jurist simply ruled, in substance, that the plea of guilty by the petitioner had rendered the two remaining motions academic (22a-8a). Thus did the petitioner lose one round in his battle to avoid imprisonment.

Tangentially, certain additional observations may be injected at this point. After Executive Assistant District Attorney Rotker had urged incarceration of Santobello, no formal motion to withdraw the plea of guilty was made, although we concede for present purposes, as we did in the State appellate courts, that the plaint uttered by defense counsel about the broken sentence promise amounted to the same thing. At the time that complaint was voiced, Mr. Rotker remarked, in substance, that there was no evidence of such a promise having been made (34a). While that comment might arguably suggest that Mr. Rotker was unaware of his associate, Mr. Greenfield's, action, the fact of the matter can not be demonstrated on this record. But if our interpretation of the law advanced herein is sound, proof on that subject would not appear to be critical. Suffice it to say for present purposes that the sentencing judge—apparently sensing no legal need for resolution of the pertinent issue—acted so swiftly at the time now pertinent that Mr. Rotker was not given an opportunity to pursue the issue he had raised. Of course, time permitted exploration of the "promise" issue when it was raised on appeal, hence the relevant concession by the prosecution.

Getting back to the sentencing proceeding, in order to make another point, Justice Gellinoff stated, in substance, that the district attorney's actions would not have influenced him in any way and that the probation report left him with no practical alternative other than to incarcerate the petitioner (35a). In our view, that decision, assuming the existence of a viable "sentence agreement," did not infringe upon Santobello's due process rights, making the prosecutor's conduct innocuous.

We have already noted this tribunal's insistence upon fundamental fairness in taking pleas from criminal defendants. But, this Court's pronouncement that a guilty plea must be voluntarily and knowingly made in order, *inter alia,* to protect a person whose conduct does not fall within the charge from pleading thereto [see, *e.g., McCarthy* v. *United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171 (1969)], is not undermined simply because a prosecutor and a judge permit a defendant "* * * to plead guilty to a lesser offense included in the offense charged * * *" [*Brady* v. *United States,* 397 U.S. 742, 90 S.Ct. 1463, 1470 (1970)]. Here, no question as to the petitioner's guilt has been raised in a proper or timely fashion [see *North Carolina* v. *Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970)]. Moreover, the instant record will not support, and the petitioner Santobello does not level (*cf.,* petitioner's brief, pp. 9, 11-12), an allegation that prosecutorial or judicial powers respecting charging and sentencing, respectively, were employed to induce the plea of guilty by the petitioner. Put another way, we do not have, on this record, a situation analogous to the type of over-reaching referred to by this Court in footnote 8 of the *Brady* opinion.

Needless to say, a sentence promise by a prosecutor may be broken for reasons other than actual impropriety on the part of such an official, for example, a breach might conceivably occur as a result of a simple lack of communication between prosecutors in a large office. Beyond question, of course, such wrongs must be righted when the facts come to light. As we read the cases, the mandate for rectification is predicated upon notions of substantial fairness and must be carried out without regard to the circumstances occasioning the breach of agreement. The authorities, again as we interpret them, insist that defendants circumstanced like the petitioner herein be given relief by the courts which might be termed the "functional equivalent" of what they had been promised by the prosecutors, and ordinarily that relief appears to take the form of either granting permission to withdraw the plea of guilty or modifying the sentence to accord with the term of years which the prosecutors had promised they would recommend [see *Machibroda* v. *United States, supra; White* v. *Gaffney,* 435 F. 2d 1241 (10th Cir., 1970); *McCarthy* v. *United States,* 433 F. 2d 591 (1st Cir., 1970); *Kearns* v. *Field,* 432 F. 2d 68 (9th Cir., 1970); *Grant* v. *United States,* 424 F. 2d 273 (5th Cir., 1970); *Byes* v. *United States,* 402 F. 2d 492 (8th Cir., 1968), *cert. den.* 393 U.S. 1121, 89 S.Ct. 999 (1968); *United States* v. *DelPiano,* 386 F. 2d 436 (3d Cir., 1967), *cert. den.* 392 U.S. 36, 88 S.Ct. 2306 (1967); *Scott* v. *United States,* 349 F. 2d 641 (6th Cir., 1965); *Vanater* v. *Boles,* 377 F. 2d 898 (4th Cir., 1967); *Holt* v. *United States,* 329 F. 2d 368 (7th Cir., 1964); *United States* v. *Lester,* 247 F. 2d 496 (2d Cir., 1957); *Howard* v. *State,* 280 Ala. 430, 194 So. 2d 834 (1967); *Cross* v. *State,* Ark., 452 S.W. 2d 854 (1970); *People* v. *Delles,* 69 Cal. 2d 906, 447 P. 2d 629 (1968); *Roberts* v.

People, 158 Col. 76, 404 P. 2d 848 (1965); *Brown* v. *State,* Fla., 245 So. 2d 41 (1971); *People* v. *Mitchell,* 46 Il. 2d 133, 262 N.E. 2d 915 (1970); *State* v. *Lindsey,* Iowa, 171 N.W. 2d 859 (1969); *Schwerm* v. *State,* Minn., 181 N.W. 2d 867 (1970); *State* v. *Roach,* Mo., 447 S.W. 2d 553 (1969); *State* v. *Journey,* 186 Neb. 556, 184 N.W. 2d 616 (1971); *People* v. *Bagley,* 23 N.Y. 2d 814, 244 N.E. 2d 880 (1969); *People* v. *DeWolfe,* 36 A.D. 2d 618, 318 N.Y. Supp. 2d 810 (2d Dept. 1971); *People* v. *Hernandez,* 29 A.D. 2d 865, 289 N.Y. Supp. 2d 394 (2d Dept. 1968); *People* v. *Brooks,* 18 A.D. 2d 710, 236 N.Y. Supp. 2d 228 (2d Dept. 1962); *Jones* v. *State,* Okla., 477 P. 2d 85 (Ct. of Crim. Appeals 1970); *Commonwealth* v. *Alvarado,* Pa., 276 A. 2d 526 (1971); *Bailey* v. *MacDougall,* 247 S.C. 1, 145 S.E. 2d 425 (1965); *Garrison* v. *Rhay,* 75 Wash. 2d 98, 449 P. 2d 92 (1968); *State ex rel. Clancy* v. *Coiner,* W. Va., 179 S.E. 2d 726 (1971); *Kruse* v. *State,* 47 Wis. 2d 460, 177 N.W. 2d 322 (1970)].

In our view, the petitioner Santobello received "functional equivalency" relief. Before developing that theme, we wish to pause for a discussion of an even more fundamental consideration, to wit, whether a representation by a prosecutor that he will remain silent at the sentencing of a defendant is in reality a "sentence promise." First of all, we have found no authority on the subject. Moreover, we doubt, and this record utterly fails to demonstrate, that sentencing judges are necessarily influenced by either a prosecutor's silence or his request for incarceration of a defendant. As a matter of fact, Justice Gellinoff represented that neither course of action would have swayed him, his only criterion for imposing sentence being the

probation report (35a). As we have seen, Santobello's earlier exposure to the courts positioned him to know that only judges control sentences. Under such circumstances, the petitioner simply entertained what the cases characterize as an unwarranted expectation of leniency which, when it fails to materialize, is not enforceable by judicial action [see *Holt* v. *United States, supra; State* v. *Zarate,* Ariz., 478 P. 2d 74 (1970); *State* v. *Helter,* Iowa, 179 N.W. 2d 371 (1970); *Schwerm* v. *State, supra; Mathis* v. *Warden,* Nev., 471 P. 2d 233 (1970); *Johnson* v. *State,* 49 Wis. 2d 455, 182 N.W. 2d 502 (1971)]. As a consequence, the prosecutor's action herein might reasonably be declared to be somewhat akin to innocuous error at trial and the judgment affirmed on that basis [see *Chapman* v. *California,* 386 U.S. 18, 24, 87 S.Ct. 1283 (1967)].

Such an approach, we acknowledge, would negate the imposition of any sanction for the conduct of the prosecutor's office. However, this Court perhaps might feel that any breach of the relevant type agreement, however inadvertent and however unrealistic the defendant's related hope, must be judicially redressed because of the high levels of conduct and of fairness to which prosecutors are properly held. Even if such is the case, we would submit that the judgment could still be affirmed on the ground that the petitioner Santobello received the functional equivalent of an honored sentence promise.

Obviously, we base that contention primarily upon the averments of Justice Gellinoff (35a). Before that jurist voiced those remarks, he was aware of three critical factors —*viz.*, (1) that the probation report, in rather strong language, recommended incarceration of the petitioner; (2)

that the prosecutor's request for Santobello's imprisonment might have been voiced in violation of another prosecutor's promise to remain silent on the subject of sentence; and (3) that no claim of innocence was then being made by the petitioner. Yet, possessed of legal power to permit withdrawal of the plea or to take evidence on the relevant claim, Justice Gellinoff announced that he would not have been influenced by any conduct of the prosecutor, and certainly there is no reason for not now taking that averment at face value. Nor is there any reason to believe that the jurist in question did not, or in so short a time was unable to, evaluate the fact that a prosecutorial promise to the petitioner had been dishonored. Additionally, the imposition of the prison term is unassailable in view of the probation report. In sum, then, all relevant factors were weighed by Justice Gellinoff, and the manner in which he exercised his discretion may not be termed abusive.

In urging the foregoing argument, we have not been unmindful of the single precedent in the area which, while seemingly rejecting our contention, will be deemed factually distinguishable upon close analysis, at least in our opinion [see *White* v. *Gaffney*, 435 F. 2d 1241 (10th Cir. 1970)].

In *White*, a county attorney failed to live up to a promise to recommend to the court that the sentence imposed upon the defendant should be for a long term of years, rather than life imprisonment, which latter type of sentence barred the possibility of parole under Kansas law. Immediately after sentencing, the matter was called to the judge's attention, and proceedings were held on a motion

to withdraw the plea the following day. In refusing to permit withdrawal of the plea, the jurist in question pointed out that he had not been a party to the agreement; that if the recommendation had been made as agreed, the sentence would have been identical; and that the county attorney had made the recommendation at the time of the motion for permission to withdraw the guilty plea. The Kansas courts affirmed the conviction, essentially on the "functional equivalency" ground that we have advanced herein. However, the Tenth Circuit reversed the judgment, expressing the opinion that the State courts had improperly concluded that the question for resolution was the effectiveness of the promise. As the pertinent Federal Court evaluated the situation, the State courts had overlooked the essential constitutional defect in the plea by simply assuming that the defendant would have entered the same plea had he been aware that there would be no recommendation. Moreover, on the basis of an evidentiary hearing, the Tenth Circuit, after noting that the sentencing judge therein generally followed the county attorney's recommendations, concluded that the defendant White would not have entered the guilty plea but for the prosecutorial promise.

Manifestly, then, the *White* court and the argument advanced by us hereinabove are at odds respecting the proper focal point in a case such as the instant one. For our part, we adhere to the view that, as long as the promise is communicated to, and considered by, the sentencing judge, the defendant has received all for which he had bargained. To reject that contention seemingly would be tantamount to imposing a pervasive sanction upon prose-

cutors for even such lapses as dilatoriness. Certainly, a defendant's disappointment respecting the sentence imposed upon him does not have to be assuaged for such slight cause. Additionally, while it should have no significance *vis a vis* constitutional rights, the fact that White faced a lifetime of imprisonment without hope of parole might conceivably have had an effect upon the decision of the Tenth Circuit.

However, there is, as stated earlier, an aspect of this case which not only differentiates it from *White,* making resolution of the conflicting views just discussed unnecessary, but which also constitutes an independent ground for affirmance of the judgment. For the record establishes that the petitioner Santobello did not plead guilty in reliance upon the prosecutor's promise, but rather because he decided to take his chances on receiving a suspended sentence from a particular judge—a strategem which simply backfired.

The factors upon which we are relying in support of this contention have already been discussed. They include, to begin with, the petitioner's knowledge of the way in which courts function, and his appreciation that, even if the prosecution remained silent at sentence, he had little chance of escaping incarceration, given his background and the minimal sentencing range to which he would be exposed after being permitted to plead to a reduced charge. Also relevant are such things as the timing of the plea of guilty and the first motion to suppress, which application was abandoned after the plea was entered; the absence of a timely assertion of innocence; and the efforts made to

withdraw the plea and to renew the abandoned suppression motion when the prospective action of Justice Marks was augured, a time when Santobello had no reason to believe that the pertinent agreement would be broken. On the strength of these factors, the conclusion is unavoidable that Santobello was not induced to plead guilty by the prosecution's representation and, consequently, that there was no viable "sentence agreement" attendant upon the entry of the plea of guilty.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

BURTON B. ROBERTS
District Attorney
Bronx County

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

September 23, 1971

SANTOBELLO *v.* NEW YORK

CERTIORARI TO APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 70–98. Argued November 15, 1971—Decided December 20, 1971

After negotiations with the prosecutor, petitioner withdrew his previous not-guilty plea to two felony counts and pleaded guilty to a lesser-included offense, the prosecutor having agreed to make no recommendation as to sentence. At petitioner's appearance for sentencing many months later a new prosecutor recommended the maximum sentence which the judge (who stated that he was uninfluenced by that recommendation) imposed. Petitioner attempted unsuccessfully to withdraw his guilty plea, and his conviction was affirmed on appeal. *Held:* The interests of justice and proper recognition of the prosecution's duties in relation to promises made in connection with "plea bargaining" require that the judgment be vacated and that the case be remanded to the state courts for further consideration as to whether the circumstances require only that there be specific performance of the agreement on the plea (in which case petitioner should be resentenced by a different judge), or petitioner should be afforded the relief he seeks of withdrawing his guilty plea. Pp. 260–263.

35 App. Div. 2d 1084, 316 N. Y. S. 2d 194, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 263. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and STEWART, JJ., joined, *post*, p. 267.

Irving Anolik argued the cause and filed a brief for petitioner.

Daniel J. Sullivan argued the cause for respondent. With him on the brief was *Burton B. Roberts.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the State's failure to keep a commitment concerning